



# The Arbitrator, the Collective Agreement and the Law

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## Notes and Comments

### THE ARBITRATOR, THE COLLECTIVE AGREEMENT AND THE LAW

By PAUL C. WEILER\*

Two recent decisions in the Ontario High Court, quashing labour arbitration awards, have demonstrated the need for a thorough canvass of the complexities of a new and important issue in labour arbitration. Very generally stated, the problem is whether, and to what extent, an arbitration board, in adjudicating a grievance under the collective agreement, may utilize statutes in reaching its decision.<sup>1</sup> To the layman this might not appear to be a very difficult problem. He would naturally assume that laws enacted by the representative and sovereign legislature would be binding on all citizens of the jurisdiction, including arbitrators. To the lawyer, though, the issues are much more troublesome, because the legal mind is much more concerned with proper procedures and limited jurisdictions. Almost invariably a collective agreement defines an arbitrator's jurisdiction in terms of the interpretation and application of the provisions of the agreement. Most then include a prohibition against the arbitrator adding to or amending any of the terms of this agreement. Since utilization of statutory materials appears inconsistent with these typical arbitration clauses, and since the contract is the source of the arbitrator's authority to decide the dispute in the first place, the lawyer's concern is understandable.

Before I canvass the dimensions of the problem in detail, I will take a brief look at the judicial response. In *International Chemical Workers Union v.*

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<sup>1</sup> Though I have not found previous discussions of this issue in the literature of Canadian labour law, there are several good contributions in recent American publications. I have relied especially on the publication of meetings of the National Association of Arbitrators. See Meltzer, "Ruminations about Ideology, Law, and Labour Arbitration", from *The Arbitrator, the N.L.R.B., and the Courts*, (1967 — 20th Annual Meeting) 1, at 14-19; with comments at 27-36; Mittenthal, "The Role of Law in Arbitration", with rejoinders from Meltzer, Howlett and St. Antoine, from *Developments in American and Foreign Arbitration* (1968 — 21st Annual Meeting) at 42; and Sovern, "When Should Arbitrators Follow Federal Law", from *Arbitrators and the Expanding Role of Neutrals* (1970 — 23rd Annual Meeting) 29. Recent discussions of special areas of statute law and arbitration include Gould, *Labour Arbitration of Grievances Involving Racial Discrimination* (1969), 24 *Arbitration Journal* 197; McKelvey, *Sex and the Single Arbitrator* (1970-71), 24 *Industrial and Labour Relations Review* 335. I will indicate the positions taken by these various writers later on, where appropriate to the text.

*Krever et al.*<sup>2</sup> a grievance had been brought by the Union against Consumers' Gas for having a supervisor do work normally performed by bargaining unit employees, in breach of an explicit term of the agreement. The arbitrator, however, denied the grievance on the grounds that the supervisor in question was the only person who was qualified to perform this work, under safety regulations issued by the Atomic Energy Control Act. The Court quashed the award on the ground that the decision was in conflict with the terms of the agreement, and the Board was not justified in using the regulations to justify such an alteration of these terms. Mr. Justice Stark does say that "the Board is strictly limited to interpreting the written contract", and thus seems to speak directly to our problem. However, it is also apparent that his conclusion in the circumstances of this case was affected by the fact the Company had deliberately placed itself in the position of having to choose between the agreement and the legislation, when it promoted the supervisor out of the bargaining unit.

No such restrictive interpretation can be placed on the decision in a more recent case. In *R.C.A. Victor Ltd. v. I.W.A.*,<sup>3</sup> the collective agreement provided for limited major medical insurance at the expense of the Company. However, this insurance agreement was rendered null and void by Section 25 of the Health Services Insurance Act of 1969, which provided for compulsory medical insurance through O.H.S.I.P. Section 10(2) of the Act provided that:

Nothing in this Act shall be construed to affect any agreement or arrangement for contribution by an employer of all or any of the premiums payable for insurance in respect of his employees and any obligation of the employer thereunder to pay all or any part of the premium for insured health services continues in respect of the payment of the premium for insured health services under this Act.

The Union lodged a grievance which claimed that the Company should pay for all the premiums of O.H.S.I.P., the latter being a more comprehensive and more expensive scheme. A difficult question of statutory interpretation was raised in the case but the arbitrator concluded this issue in the Union's favour and upheld the grievance.<sup>4</sup> Mr. Justice Grant in the High Court quashed the

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<sup>2</sup> (1968), 68 C.L.L.C. 14,086 (Ont. H.C.).

<sup>3</sup> (1971), 71 C.L.L.C. 14,099 (Ont. H.C.).

<sup>4</sup> I was also faced with the same problem as arbitrator of a different agreement of R.C.A. Victor with another union at a different plant, though with the same language. My decision followed the arbitration award in the case referred to in the text but preceded the quashing of that award. Suffice it to say that, in my opinion, I held that I had jurisdiction as an arbitrator to consider what I took to be a statutory amendment of a term of the collective agreement in the course of interpreting and applying the agreement itself. However, I interpreted the statutory amendment in accordance with the Company argument, and the conclusion of Mr. Justice Stark. The jurisdictional issue is complicated by the fact that Section 10(3), which created a new union right to the excess of any premiums following the changeover to OHSIP, specifically provided for arbitration under Section 10(3) and inferentially excluded it under Section 10(2). This view of statutory interpretation does not seem to me to do justice to the reasonable expectations of the legislature. The obligation to pay premiums for the old private scheme was enforceable in arbitration. The legislature has provided for the use of arbitration to enforce the new obligation in respect of the excess of premiums under OHSIP. What possible reason could it have for excluding the use of arbitration to enforce the continued basic obligation to pay the premiums for the new insurance scheme of OHSIP? In interpreting statutes or collective agreements, I have always found it a very helpful step in assessing the contentions of either side to ask the simple question — "Now why would the legislature (or the parties) have wanted that result?" If this question were asked in the R.C.A. Victor situation, the conclusion as to the jurisdictional issue is, with all due respect, obvious.

award on two grounds, one relating to the interpretation of the statute but the first, and more important for our purposes, being that the arbitration board had no power to base its decision on the statute rather than the agreement. Key passages in his opinion which indicate the gist of his reasoning read as follows:<sup>5</sup>

All subsections of section 10 do impose obligations on the employer, who has contracted with employees to provide them with some form of health insurance. The section deals with the extent of such continued obligation during the balance of the term of the agreement or until a new agreement in respect thereof has been negotiated between the parties. In our present case, the rights and obligations of the parties, however, in that interval arise by virtue of the statute rather than by the agreement. It would be otherwise if the parties by their agreement had specifically contracted as to their respective rights and obligations when OHSIP should become effective.

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A board of arbitration derives its authority from and is limited by the terms of the collective agreement. Its jurisdiction is solely to determine questions arising with respect to the application, administration or alleged violation of the collective agreement. The board was limited in its consideration of this grievance to the question as to whether or not the collective agreement, as opposed to the statute, imposed an obligation on the part of the company to pay all the additional OHSIP premiums when the same should come into effect on October 1st, 1969.

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The majority award is therefore beyond the jurisdiction of the board by reason of the fact it has based its decision on an interpretation of the statute rather than on the collective agreement.

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These are the two judicial decisions reported in recent Canadian law which focus directly on this problem. (Of course, there is a great deal of general language in other decisions about the limited contractual character of an arbitrator's jurisdiction. However, the cases either do not deal with a statutory basis for the alleged "amendment" of the agreement<sup>6</sup> or, if they do, the statute is interpreted as inapplicable in any event.<sup>7</sup>) As far as the two relevant cases are concerned, whatever may be said about the rightness or wrongness of the particular decisions, the reasoning in each displays the deficiency which is endemic across the whole spectrum of judicial review of administrative deci-

<sup>5</sup> *Id.* at 14,524-25.

<sup>6</sup> In *Port Arthur Shipbuilding v. Arthurs*, [1969] S.C.R. 85 at 95-96, the Supreme Court of Canada said:

An arbitration board of the type under consideration has no inherent powers of review similar to those of the Courts. Its only powers are those conferred upon it by the collective agreement and these are usually defined in more detail. It has no inherent powers to amend, modify, or ignore the collective agreement. But this is exactly what this board did in this case and it was clearly in error in so doing, and its award should be quashed.

Though this passage was relied on by the court in *R.C.A. Victor Ltd.*, it dealt with the power of an arbitrator to "imply" additional remedial powers as part of a common law of labour arbitration, not with his right (or duty) to apply mandatory statutory provisions in administering the agreement.

<sup>7</sup> Two other recent Supreme Court of Canada decisions, *Union Carbide v. Weiler* (1968), 70 D.L.R. (2d) 333 and *General Truck Drivers Union Local 938 v. Hoar Transport* (1969), 4 D.L.R. (3d) 449, dealt with a situation where an arbitrator (this writer) utilized a statute as the basis for giving relief to the application of procedural penalty clauses in the agreement. The decision of the Court, as I read it, is based on the conclusion that the statute did not apply, and is not authority against using statutes if they are interpreted as applying.

sions.<sup>8</sup> The nature of this deficiency is nicely captured by the phrase "absentee management". The courts see only a very few of the "trouble cases" which may appear among the many decided by those with primary responsibility in the area (and any one judge is involved in only a fraction of those which do get to court). As a result, the judge is directly confronted with only an isolated slice of what is usually a complicated legal situation. Moreover, the limitations of the adversary process do not permit ready education of the judges in the many facets of the legal area as a whole. Even if the administrative decisions are reported (as are the labour arbitration cases, for instance), it is almost unheard for judges to read or utilize them directly.

Yet the courts "hold the trumps" because of their superior position in the hierarchy of legal authority. They can insert new, abstract, and authoritative legal doctrines into the on-going process of administrative decisions, which can wreak great damage to the coherence of this order, especially when read literally and out of context. Despite these evident dangers, the belief in the desirability of judicial review remains dominant in our legal ideology and its incidence is rapidly increasing in labour arbitration. I believe the only way to preserve the virtues and minimize the harms from judicial supervision of specialized tribunals is to initiate scholarly discussion of problem areas in substantive administrative law and policy, as they are seen from *inside* the process. These must canvass *all* the issues in the area, showing both the relationships and differences between them, and articulating the reasons why the law should lean one way rather than another. If these are used both by lawyers and by the courts, it will be possible to develop a more informed, and perhaps more sympathetic, exercise of judicial review. It is to this end that this comment is directed.

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There are several different contractual situations in which a statutory rule may be relevant. The first occurs where there is very general or vague language in a contractual provision and the statute is sought to be used as an aid in interpretation of the agreement. For example, the agreement may speak in general terms of rights accruing to an "employee". Can an arbitrator look to the Labour Relations Act for help in defining the status of a person on a legal strike, for example?<sup>9</sup> An agreement provides that there is to be no discipline without "just cause". Can an arbitrator, faced with discipline for insubordination in refusing to obey a work order, look to a statute (e.g., the *Atomic Energy Control Act*)

<sup>8</sup> I have analyzed this defect in judicial review in greater detail in a recent article about the Supreme Court of Canada and labour law. See Weiler, *The 'Slippery Slope' of Judicial Intervention* (1971), 9 Osgoode Hall Law Journal 1.

<sup>9</sup> In *Falconbridge Nickel Mines* (1971) unreported (Weiler), I utilized the Section 1(2) definition in the Labour Relations Act of the status of an employee on strike as an aid in interpreting the significance of time on strike in calculating the service which determined the length of vacation to which an employee was entitled under the agreement. This decision was recently upheld on a certiorari motion in the High Court. The arbitrator in *Canada Bread Co.* (1970), 22 L.A.C. 98 (Christie), used various provisions in the Labour Relations Act in defining the ambit of the "collective agreement" which he was to apply. Similarly, the problem of determining length of seniority where corporate ownership of a plant changes but the agreement is continued would be helped by a consideration of Section 7 of the Employment Standards Act, which provides for continuity of employment upon transfer of a business (a factor which was missed in the decision in *Reinforcing Steel* (1970) unreported (Weiler)). I would add at this point that the arbitration cases which I am going to cite are primarily my own, because I am using them mainly as illustrative of different problem-situations. I have not systematically canvassed all the arbitration decisions to try to establish any arbitral consensus as to the issues.

in determining whether the work ordered was unsafe?<sup>10</sup> An agreement provides for seniority rights to jobs where there is sufficient "ability". Can an arbitrator look to statutes prohibiting discrimination against women to hold that general company rules against women holding some jobs are invalid?<sup>11</sup>

The very general and sweeping language of Mr. Justice Grant, while admittedly directed to another problem, does appear to throw doubt on the legitimacy of the reference to statutes in any of these situations, and I have had counsel argue against their use on such a basis. However, I think there can be no doubt that such a source for arbitral reasoning both should be, and will be, held legitimate. The arbitrator is enforcing an obligation imposed by the agreement, and is only using the statute as an aid in discovering or crystallizing the meaning of the agreement. The language of the agreement on its face does not give the answer and arbitration boards may and do use their own common sense, other arbitration precedents, or common law decisions to elaborate the meaning of the contract. Surely, the policies and standards developed by the legislature should be of even more significant weight in this process. The parties should be assumed to want their agreement interpreted, if possible, in line with contemporary law (even if this requires over-riding earlier common law or arbitral presumptions<sup>12</sup>).

<sup>10</sup> For example, would the decision in the *Krever* case, *supra*, note 2, have been the same if a bargaining unit employee had been ordered to do the work, declined to do so because he believed it unsafe without qualifications or experience, and been suspended for insubordination. In determining whether this discipline was for "just cause", could an arbitrator look at the statutory safety regulations? In a recent case, *Int'l Woodworkers of America Local 1-71 v. Weldwood* (1970), 74 W.W.R. 568 (B.C.C.A.), the Court of Appeal looked at a safety provision in a statute to find the employees' conduct to be unsafe and negligent, and thus open to discipline. On the other hand, the propriety of an arbitrator looking at a statute for this purpose was seriously doubted in *Re Pulp, Sulphite and Paper Mill Workers and Domtar Pulp and Paper* (1966), 16 L.A.C. 408 (Lane), and apparently, in *Ontario Steel Products* (1972), 23 L.A.C. 386 (Hinnegan).

<sup>11</sup> In *Re ICW Local 186 and Continental Can* (1970), 21 L.A.C. 361 (Palmer), the arbitrator referred, though in a subsidiary way, to the legislative policy of the province to find such a company practice to be invalid under the general language of the Agreement.

<sup>12</sup> It is in this latter situation that the use of statutory materials is likely to be most significant. Earlier arbitration precedents may have established presumptions in applying general language in the agreement, and the latter statute may make this presumption illegal. Resort to the statute may be the necessary basis for the legal justification of ignoring a series of precedents which constituted a consensus among arbitrators. For example, many earlier decisions had held overtime to be compulsory in the absence of contrary language in the Agreement. Sections 14 and 18 of the Employment Standards Act make overtime illegal after 8 hours in the day and 48 hours in the week. These sections were relied on in *Lake Ontario Steel* (1968) unreported (Johnston) and *Lake Ontario Steel* (1968) unreported (Weiler), to hold that employees could not be compelled to work overtime, or disciplined for refusal, in breach of the statute (and where one of the exempting provisions in the statute did not apply). Neither of these cases involved an agreement with explicit language making all overtime compulsory (as was held to be the case in *Re Int'l Union of Electrical Workers, Local 566 and J.A. Wilson Display* (1968), 19 L.A.C. 352 (Johnston)), and in *Galt Metals* (1971), 3 L.A.C. 33 (Egan). Since writing this piece, I have reviewed the relation of the Employment Standards Act as to overtime under the collective agreement in the as yet unreported decision in *Grace Cryovac* (1972; Weiler). A similar problem would be faced in cases of discipline for garnishee orders which was apparently justified under earlier arbitration decisions (the cases are reviewed in *Re Lumber and Sawmill Workers' Union Local 2537 and K.V.P. Co. Ltd.* (1965), 16 L.A.C. 73 (Robinson)), but is now illegal under Section 5 of the Employment Standards Act: "No employer shall dismiss or suspend an employee upon the ground that garnishment proceedings are or may be taken against that employee."

I have referred to, though not discussed in detail, the problem of the use of statutes as an aid in interpreting the collective agreement, even though I do not believe there is much doubt about its legitimacy and the two decisions mentioned earlier do not focus on its legality. However, it is vital that we distinguish these cases from those that do raise real issues about the limits of an arbitrator's jurisdiction in order that our answer to the latter not unwittingly produce an undesirable rule for the former. The difficult cases, where there is a real conflict of important interests, occur where the statutory rule is inconsistent with the provision of the collective agreement, or any fair interpretation of the latter. This becomes a problem when the statute mandatorily limits and over-rides the exercise of a contractual freedom, and is not just a supplementary aid in the interpretation of the open or "unwritten" area of the agreement. Is it legitimate for an arbitrator to take account of this legislative purpose in the performance of his task of administering the collective agreement?

A further basic distinction must be made even within this category. Sometimes, the objectives of the statute may be negative — the prohibition of certain kinds of contractual terms — and the arbitrator will satisfy them by simply holding the offending contract term to be void for illegality. For example, the contract may provide for compulsory overtime in breach of the Employment Standards Act, or employer reimbursement of the last 10% of doctor's bills in breach of the O.H.S.I.P. Act, or sex as a criterion for promotion, or pregnancy as an automatic reason for discharge. If this clause is deemed null and void, it is simply treated as excised from the collective agreement and the rights and duties of the parties in arbitration can be determined by the application of the other terms of the agreement. Refusal to work overtime, or being pregnant, is evaluated under the "just cause" provision, seniority by reference to "ability" in the individual case, and the employer is not obligated to pay any "insurance" for the remaining 10% of unpaid medical bills.<sup>13</sup> This procedure is legally defensible, I believe, as an application of a contract doctrine of "illegality", which is as much a part of the background of contract law as the "parole evidence" rule. It leaves the arbitrator positively enforcing only those obligations which actually flow from the contract.

The other, and much more difficult situation, occurs where the statute itself is intended to place a positive obligation on one of the parties to the agreement.<sup>14</sup> The Employment Standards Act may require payment of minimum

<sup>13</sup> A recent example of the latter situation is *Bendix-Eclipse v. U.A.W.* (1971), 71 C.L.L.C. 14,089 (Ont. H.C.), where the arbitrator interpreted the agreement as requiring the employer to pay some of the extra doctor's fees unpaid by O.H.S.I.P., and the court quashed the award as requiring private medical "insurance" which was illegal under Section 25(1) of *The Health Services Insurance Act*, R.S.O. 1970 c. 200. Presumably the recent decision of the Arbitration Board in *Board of Education of Etobicoke* (1972) unreported (Vinnegan) may receive the same treatment.

<sup>14</sup> There are some positive obligations imposed on the parties, or directions given to the arbitrator, under *The Ontario Labour Relations Act*, R.S.O. 1970 c. 232 which appear to give him explicit powers to apply even in the face of contrary language in the agreement. See Section 36(1) dealing with the no-strike clause, Section 37(1) and (2) dealing with the arbitration clause, Section 37(7a) dealing with the equitable jurisdiction of the arbitrator in discipline cases and Section 70 dealing with the statutory extension of the agreement during conciliation. Interesting questions have been and can be raised about the compatibility of certain qualifications in the agreement and the scope of these mandatory terms of the agreement, and the question might arise as to the arbitrator's power to follow the statute in face of the agreement. (See the discussion in *Royal Canadian Mint* (1972), 23 L.A.C. 365 (Abbott).



wages, or vacations, or overtime pay.<sup>15</sup> The Health Services Insurance Act requires substitution of O.H.S.I.P. for P.S.I. and other private plans. It is not enough simply to invalidate the offending wage, vacation pay, or health insurance provisions in order to attain the statutory objectives because this will not provide the employee with the positive benefits he is supposed to receive. Yet the situation might appear to be qualitatively different in legal or jurisdictional terms because the arbitrator is now positively implementing obligations created by statute and not by contract. I have no doubt that reviewing courts will find this a much more difficult arbitral innovation to swallow. Still, though, the dimensions of the problem are basically the same — do we feel arbitrators are competent to interpret statutes and do we want them to use these statutes to rewrite part of a collective agreement, the whole of which has been negotiated through compromises by each of the parties? Neither of these factors is altered if we conceive of the statute, or the arbitrator's use of it, in essentially negative or positive terms.<sup>16</sup>

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What should be the legal response to this jurisdictional problem? There are plausible arguments which can be made for either side and I will begin by making the case for arbitral jurisdiction first. The labour relations policy in Ontario, expressed both in the statute<sup>17</sup> and in decisions of the Labour Relations Board,<sup>18</sup> favours the channelling of contractual disputes between parties to a collective agreement into grievance arbitration. The parties are both familiar with and comfortable in this procedure. *Prima facie*, it makes sense to channel disputes about statutory amendments into the same institution, rather than utilizing another tribunal or the courts. The arguments of cost, speed, and informality which justify arbitration generally are equally applicable here.<sup>19</sup> In fact, they are even more significant in this context because the alternative is almost certainly going to be duplication of litigation in different forums. If the arbitrator cannot utilize the statute to hold a contractual provision illegal, and he applies the latter according to its terms, the result will be that the award will have to be taken to court every time in order to consider the relevance and effect of a statute.<sup>20</sup> If an arbitrator cannot apply the statute positively, as a source of

<sup>15</sup> In *Sargent Hardware* (1971) unreported (Weiler), I was faced with a claim by a female employee for equal pay for equal work under Part 6 of the Employment Standards Act. The Union argued that separate male and female seniority lists under the agreement did not reflect differences in the work actually performed, and thus differential rates of pay were in breach of this Part of the Act which prohibited such discrimination based on sex. In fact, the seniority lists did reflect differences in jobs and thus my decision was that the grievance was invalid and the real statutory claim was one relating to discrimination in promotion. However, if I had found the factual basis of the Union claim to be established, it would not have been enough, for the grievor's purposes, to simply hold negatively that the offending provisions were illegal and thus void. The grievor's claim required a positive right under some term defining the wages to be paid and a very nice question would arise as to whether they should be the lower female or the higher male rates. Discrimination could be eliminated by discarding either the male rate or the female rate or by averaging the two. The choice as to any one of these requires a positive definition by the adjudicator of the new obligation of the employer. Finally, I must note that the evidence at the hearing disclosed that the Union was told by the Department of Labour to take the case to arbitration, rather than under the statutory procedures. The fact that the government administration believed this to be a desirable policy, and my discovery in the case of the jurisdictional roadblocks to it, triggered my own interest in this enquiry.

<sup>16</sup> Two of the writers mentioned in note 1 above have drawn a somewhat different, though related, distinction. Mittenthal, at pp. 47 ff., says that "although the arbitrator's award may *permit* conduct forbidden by law but sanctioned by contract, it should not

require conduct forbidden by law even if sanctioned by contract." Sovern, at pp. 38 ff., agrees with the substance of this distinction, though with certain further qualifications on the use of statutes even in the latter case. The implications of this approach can be gathered from a simple example of a seniority clause which conflicts with an *Act to prevent Discrimination in Employment because of Sex or Marital Status*. If the employer chooses to follow the Act, and thus is in breach of the agreement, and an employee who is entitled under the agreement grieves, the arbitrator will utilize the statute so as not to order illegal action by the employer. On the other hand, if the employer chooses to follow the agreement, and thus is in breach of the Act, and an employee who is entitled under the Act grieves, the arbitrator will refuse to utilize the statute and thus will permit illegal action by the employer, leaving sanctions for the latter to appropriate governmental action. Since the effect of this procedure is to leave discretion with the immediate decision-maker to respect the statute or agreement as he chooses, and the employer almost always has this initial discretion, the adoption of this approach merely extends the ambit of management discretion. A compelling answer to the suggestion was made, I believe, by Meltzer, at p. 60:

Whatever one's view of the larger issue as to the role of law in arbitration, I cannot see an acceptable basis for Mr. Mittenenthal's formula. It is not supported by the authority conferred on the arbitrator by the parties; or by the expertise imputed to arbitrators and courts; or by the twin desires for finality of arbitration awards and the limitation of judicial intervention. Under Mr. Mittenenthal's approach, the role accorded to law would depend on how an employer resolved a controversy and not on its essential character or the functions properly delegated to different adjudicative agencies. In my opinion, such an approach transforms an accidental consideration into a decisive one. His formula, incidentally, also appears to run contrary to Cox's suggestion, on which he relies; for Cox admonished the arbitrator to "look to see whether sustaining the grievance would require conduct the law forbids or would enforce an illegal contract; if so, the arbitrator should not sustain the grievance". In my opinion, if the arbitrator is viewed as "enforcing" contracts, he "enforces" an illegal contract equally whether he causes an employer to engage in an act prohibited by statute or, by denying a remedy, condones the prohibited act already executed by the employer.

Meltzer, by contrast, forthrightly takes the view that "where there is an irrepressible conflict, the arbitrator, in my opinion, should respect the agreement and ignore the law. . . . The basis for this approach is, of course, that the parties typically call on an arbitrator to construe and not to destroy their agreement". (at p. 16). Howlett, on the other hand, argues that the statute should always be decisive, in both negative and positive terms, because the wishes of the legislature are paramount to those of the parties.

<sup>17</sup> See Section 34(1) of *The Ontario Labour Relations Act*.

<sup>18</sup> E.g., *Vera Elkington and Wallace Barnes* (1961), 61 C.L.L.C. 928 (O.L.R.B.); *United Brotherhood of Carpenters and Joiners of America and National Showcase Ltd.* (1961), 61 C.L.L.C. 901 (O.L.R.B.); *Franz Kuntz and Pitt Street Hotel Ltd.* (1963), 63 C.L.L.C. 1148 (O.L.R.B.); compare *Boivin* (1966) O.L.R.B. Oct. Mthly. Rep. 513.

<sup>19</sup> See Weiler, *The Role of the Labour Arbitrator: Alternative Versions* (1969), 19 *University of Toronto Law Journal* 16 at 29-30.

<sup>20</sup> This is what happens in the kind of situation occurring in *Bendix-Eclipse*, discussed at footnote 13 above. If the arbitrator can not only interpret the agreement but also can determine if this interpretation is illegal, and then act accordingly, he may decide the case finally at that stage. Of course, sometimes the interpretation of the statute in arbitration will be disputed and taken to court, but this will occur only in some fraction of the total number of cases. If he ignores the statute in every case, then the party who wants it applied will have to go to court every time that the other party will not concede its application. Meltzer, at p. 62, suggested that "once the arbitrator has done the job of interpreting the agreement, responsible parties will presumably obey the clear mandate of the law without recourse to the courts." In fact, I think that the party who has claimed his contractual rights successfully through arbitration and resisted the statute up to that time, is not likely to concede very often before judicial review. In fact, it is the party who has lost in arbitration in terms of a pure interpretation of the agreement, but who has a good case in terms of the statute, who is more likely to concede the case rather than go to the trouble and expense of trying to get the award quashed in court. Arbitral restraint in ignoring the statute may thus serve only to entrench the illegality and injustice in the operation of a contract term which the legislature has defined as against public policy.

obligation on the parties, then any time the statute also requires interpretation of the contract, sequential litigation in arbitration and in court will be necessary in order to obtain final relief.<sup>21</sup> Even in cases where the rights under the agreement and under the statute may be logically distinguishable, they may not be severable as a practical matter. An employee may claim that his discharge<sup>22</sup> or denial of a promotion<sup>23</sup> was unjustified and arguments are advanced by either side, some related to a statute and others not. One cannot anticipate how these arguments will turn out on the facts until all of the evidence is in and they are evaluated, and, in any event, they may be cumulatively intermeshed in evaluating the employer decision. A more efficient solution is to allow all of these factors to be assessed in arbitration, with subsequent review available elsewhere<sup>24</sup> (if this is believed necessary by either party or by the administrative

<sup>21</sup> A good example of this is the *R.C.A. Victor* case, discussed at footnote 2 above. The Court there held that the statute could not be interpreted and applied in arbitration. However, it appears from the Rights of Labour Act and certain appellate decisions, that the collective agreement cannot be interpreted and applied in court (see *Close v. Globe & Mail* (1967), 60 D.L.R. (2d) 105 (Ont. C.A.)). Yet the ultimate conclusion as to employee rights to employer contribution to OHSIP appears to depend on an interpretation and application of both statute and agreement. The only way to avoid a jurisdictional "no-man's land" is to allow sequential litigation, where an interpretation of the earlier agreement is secured in arbitration and this is taken to court for interpretation and enforcement of the statutory change in the agreement is secured. The delay, cost, and awkwardness of this procedural situation is obvious.

<sup>22</sup> In *Canada-Ferro* (1971), unreported (Weiler), I was confronted with a case of a woman who was discharged for excessive absenteeism. Some of this absence was due to a series of pregnancies with complications but some was not so related, and the employer's decision was based on the total record. Section 9 of the Act to prevent Discrimination in Employment because of Sex or Marital Status was relevant to the pregnancy-related leaves of absence but not to the other. Hence, proceedings under the Act could deal only with one part of the problem while a restrictive view of the arbitrator's jurisdiction would allow him to deal only with the other part. In reality, though, the two segments of the problem could not be distinguished.

<sup>23</sup> The problem faced by the arbitrator in *Continental Can*, *supra* note 11, where seniority was denied because of sex, would be similarly complicated if other factors were also relied on by the employer.

<sup>24</sup> The legality of the award under the statute could obviously be reviewed in court on an application for certiorari for error of law on the face of the record. However, the Court would have to be careful in utilizing its ordinary principles of judicial review for this new situation. Typically, review is sought for an error in the interpretation of the language of the contract, and the Court will quash the award only on the grounds that the interpretation is one that the contract language cannot reasonably bear. This can easily be justified on the theory that disagreements about the merits of a contract interpretation do not necessarily rise to the level of an error of law, since so much of the meaning of the contract depends on its individual background and context. (A good example of this standard in operation is *Riverdale Hospital v. Higgins, Mayo, & C.U.P.E.* (1971), 71 C.L.L.C. 14,097 (Ont. C.A.)) However, when the question is whether the arbitrator's interpretation of the statute is to be sustained, I would submit that the test is not simply whether his conclusion is reasonable, but whether it is correct (in the opinion of the Court). A court should not adopt the same attitude as it does to arbitral interpretation of contracts and hold that one meaning of the statute can reasonably be imputed in the context of one collective agreement and another meaning be accepted as reasonable under another collective agreement. A case where the Ontario Court of Appeal failed to appreciate the demands of judicial supervision of this new form of arbitral interpretation is *Ford Motor Co. v. U.A.W.* (1971), 71 C.L.L.C. 14,088 (Ont.C.A.).

I should add that the department of the government responsible for administration of the statute could also institute its own procedures under the Act if unsatisfied with its treatment in arbitration. Of course, at this second stage, care would have to be taken to prevent double jeopardy to the offending party or double recovery to the complainant.

agency). In fact, as I learned in the context of the *Sargent Hardware* case, this is the policy of at least some governmental administrators of the legislation.

There are several arguments which are made to rebut this *prima facie* case. The first, which is especially popular in the United States, is that arbitration is based on *consent* of the parties, and the latter have not contracted to allow the arbitrator this jurisdiction.<sup>25</sup> In Ontario, in any event, this argument appears to me to be misconceived. Arbitration is compulsory by statute irrespective of the wishes of the parties. The provisions of the statute are compulsory and the decision of the parties to evade them is illegal. It is perfectly legitimate to infer that the arbitrator is himself bound by the statute<sup>26</sup> in adjudicating disputes, again irrespective of the agreement of the parties to the contrary. No one of the facets of this problem depends on consent and this appears to be the weakest argument against an extension of the arbitrator's jurisdiction.

Another important argument against the arbitrator's jurisdiction, related to but subtly different from that of consent, is concerned with the value of the *acceptability* of arbitration.<sup>27</sup> This is one of the very important reasons for the very existence of grievance arbitration as a mode of dispute-settlement, because each side can select a decision-maker in whom it has confidence, while bias is minimized because each side has a similar "say". However, this acceptability is engendered in a context where the arbitrator is interpreting and applying a legal regime created and agreed-to by the parties who bear the consequences of his decision. To require arbitration to use an alien legal regime, imposed on the parties against their wishes, may harm their confidence in the long-range value of the process as an instrument of self-government. This is particularly the case where the two parties have negotiated an agreement which turns out to be partially illegal. Although both sides have made compromises to achieve this agreement, one now utilizes arbitration to get some parts of the bargain over-

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<sup>25</sup> This is the thrust of Meltzer's position, and is ably supported by St. Antoine, in the references in footnote 1 above. St. Antoine says, at p. 77, "Arbitrators do not, strictly speaking, enforce contracts; courts enforce contracts. The arbitrator is simply the 'official reader' designated by the parties to provide definitive interpretations of their agreement. . . . An arbitrator is the creature of the contract. It is the source and limit of his authority, and he has no licence to look beyond its borders for some external standard by which to nullify or restrict its operation." Mittenthal seconds this, at p. 58: "Statutory law may guide the arbitrator on occasion. But the arbitrator must follow the rule of law established by the contract. He is part of a private process for the adjudication of private rights and duties. He should not be asked to assume public responsibilities and to do the work of public agencies. He has no general charter to administer justice for a community which transcends the parties." Even in the United States, Sovern takes what I believe to be a more realistic approach which holds that it is the demands of the national labour law policy, not the agreement of the parties, which must be decisive with respect to this issue. He says that the "critical question is whether it is a desirable method of coordinating a private system of adjudication with a governmentally-imposed legal and administrative framework."

<sup>26</sup> The provisions of the Act prohibiting discrimination on account of sex prohibit "persons" establishing or *maintaining* employment classifications or lines of progression which differentiate by sex. Can it not be said that an arbitrator is a *person* who *maintains* such an illegal classification when he applies and enforces it in adjudicating a claim in arbitration?

<sup>27</sup> I have developed in more detail the significance of this characteristic of arbitration in Weiler, *Labour Arbitration and Industrial Change* (Ottawa: Queen's Printer, 1970) 67-68.

turned in his favour.<sup>28</sup> Unfortunately, there is another dimension to the problem caused by this issue for the confidence of the parties in arbitration. It may be that a lawyer can appreciate the subtle reasons why an arbitrator should ignore the clear demands of a statutory requirement but, in my experience, the layman on either the employer or the union side cannot and does not. It is at least as likely that the acceptability of arbitration will be eroded in this direction as in the other.

It seems that the most compelling concern is that of arbitral competence.<sup>29</sup> Arbitrators are specialists in, and eventually become expert at, interpreting and administering the language of collective agreements. This is not true of their capacities with respect to the language of statutes and the same may well be the case with the counsel who must provide arguments for their decision. On balance, though, I do not believe this is a valid argument for total exclusion of statutes from arbitration. In the first place, it is inconsistent with the requirement and the fact that law is constantly being used in *interpretation* within arbitration. It is common to see reference in opinions to contract law, labour law, criminal law, or evidence law, involving both statutes and cases. Similarly, as I stated earlier, the "mandatory" provisions in question here should be used in interpreting vague contract language. If arbitrators are competent to interpret statutes to elaborate the agreement, they should be equally competent to interpret statutes to over-ride the agreement.<sup>30</sup> Secondly, I do not believe that construction of statutes is so very different from construction of collective agreements, or that arbitrators are less competent than alternative adjudicators to utilize statutory materials. The kinds of people who do arbitrate in Ontario are almost all lawyers, whether judges, prosecutors, labour board members, labour law teachers, etc., and they are not strangers to this kind of legislation. Thirdly, this argument for exclusion of these materials is strangely self-fulfilling.

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<sup>28</sup> I would note the trend in recent legislation in Ontario to utilize the existing labour arbitration process to impose solutions to labour relations problems on parties who have not agreed to them. Examples include interest-dispute arbitration in hospitals, police, etc., and arbitration of damage claims for illegal strikes and lockouts outside a collective agreement. (See Section 68a of Labour Relations Act.)

<sup>29</sup> This argument is particularly relied on by Meltzer in his comments in both panel discussions referred to in footnote 1 in which he participated. He gives an example of a case where an arbitrator may well have erred in interpreting a statute and holding it invalidated an agreement and suggests that this possibility is a good reason for arbitrators not exercising any jurisdiction at all to apply statutory law in conflict with the agreement.

<sup>30</sup> This point is made by Sovern, in the article cited in note 1 above, at 34. His article goes on to deal with the relevance of this problem of the sophisticated doctrines in American law of "primary jurisdiction." The common sense which underlies these doctrines is based on the assumption that the legislature must have had very good reasons for centralizing enforcement of a new statute within the confines of a specialized and expert administrative agency. To the extent that unsupervised and *ad hoc* arbitration boards take on themselves the task of interpreting the statute, a very incoherent and often distorted administration of the law is likely to develop. However, there are two reasons why these dangers are simply not applicable in Canada. In the first place, judicial review of the interpretation of the legislation by arbitrators results in centralized supervision in the appellate courts (see note 24 above). Secondly, the statutes we are talking about almost invariably create a system of decentralized adjudication at the primary level. The devices adopted are *ad hoc* boards of inquiry (often composed of the same people who act as arbitrators) and/or enforcement procedures before a provincial court judge. Whatever controls there are to this system of adjudication come from the same appellate courts who are available to review arbitral interpretations of this same statute.

If arbitrators do not advert to, and consider statutes consistently, then they will not likely be expert. However, if they can and do use this source of law, they will become experienced in the task.

The argument of incompetence, to the extent that it is valid, is really one of caution. In cases of doubt, the decision should be in favour of legality of the contract, but if illegality appears clear, arbitrators should not be afraid to rely on their judgment. It is true that arbitrators may err in interpreting statutory law but then judicial review is available for correcting those errors, which will likely occur in only a small minority of cases. Moreover, arbitrators as a body do have something to add to the legal system in analysing the way statutes should impinge on the collective bargaining process. Only if they actively exercise this jurisdiction will the benefits of their views be available to the reviewing courts who must make the final judgments. The alternative, of course, is to require all, or almost all, cases to be relitigated in terms of the statutory issue, and this time in front of a court which does not have the assistance of an independent examination of this problem in the forum where the rest of the matter has already been adjudicated.

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We are left then with a conflict between two competing values, institutional competence and institutional economy. For reasons given earlier, I believe the former is of lesser weight in more situations than the latter, and I would support a jurisdiction in arbitration to apply statutory rules even where they are in conflict with contract terms. I would have to be a poor practical lawyer, though, if I were to predict that our higher courts will reach this same conclusion, at least in the near immediate future. My main concern, or at least hope, with respect to the courts is that they not deprive the arbitrators of statutory materials as an aid in interpretation, at the same time as they deny us the right to follow the law of the statute when it contradicts the law of the contract. A more adequate answer to the situation will have to come from the legislature and the statutory draftsmen who have created the problem and must accept responsibility for solving it. Moreover, unlike the courts, the legislature can make the decision for every statute as it assesses the weight of the two competing values in the individual case, rather than as a matter of general principle.<sup>31</sup>

My final comments in this paper, then, are directed to the legislative draftsman. I suggest that there are three separate issues for the law-maker in this area which, unfortunately, do not seem to have been fully sorted out. There is, first of all, the question whether a statute should be made to over-ride the

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<sup>31</sup> The real problem in this area has been the almost total failure of our statutory draftsmen to address this problem, one way or the other. Only in Section 10(3) of *The Health Services Insurance Act*, R.S.O. 1970 c. 200, is there explicit provision for arbitration of statutory amendments of collective agreements, and this may have served only to make more conspicuous the omission in Section 10(2). It is quite customary in *The Employment Standards Act*, R.S.O. 1970 c. 147, and other such legislation to make the Act applicable notwithstanding agreement to the contrary (see Section 3 of the Act), and to leave the matter at that. My private conversations with some officials responsible for administering this legislation indicate that they believe that such a mandatory provision itself provides the base for the arbitrator's jurisdiction and, indeed, these officials then encourage the channelling of the disputes under the Act to the grievance procedure and arbitration if it is available. The discussion in this paper and seminar should serve at least to dispel the illusion that the problem is that simple.

terms of a collective agreement, as opposed to an ordinary contract of employment. Where the purpose of the statute is to protect the interests of the employees generally, the legislature should not lightly conclude that collective bargaining is not a preferable vehicle for this purpose, without the distorting impact of a generalized statutory rule. For example, I can think of good reasons why the Employment Standards Act and women's rights legislation might be distinguished in this regard. However, assuming that the legislature wants the statute to be applied irrespective of a collective agreement, the next decision it must make is whether it wants the individual employee to have the immediate remedy of the new rights created by the statute, even though his union has agreed to trade them away in negotiations. The alternative is to use the statute as a weapon by which the government agency may force the parties who are mutually responsible for the illegal agreement to agree, mutually, to alter it with concessions from either side. Again, though, assuming the legislature wants immediate, retrospective remedies for the individual, the next question is whether the procedure or forum for obtaining this remedy, and accommodating the agreement and the statute, should be arbitration, or a court, or a specialized tribunal. For the reasons I have given, I believe that arbitration should be available as a primary source of relief, with subsequent review in court for errors of law, and with administrative remedies available under the statute as an alternative. Section 37 of the Labour Relations Act should be amended to provide that where a statute is intended (1) to over-ride a collective agreement and (2) to afford immediate employment rights to the employee, the ordinary grievance arbitration procedures under the collective agreement should be an avenue for obtaining this relief.

